Supreme Court, U.S.
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No. _____

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In The
Supreme Court of The United States
October Term 1998

DENNIS AINSWORTH McCARTHY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari
To The United States Court of
Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID J. DAMICO, ESQUIRE*
Attorney at Law
P. O. Box 1578
313 Campbell Avenue, S. W.
Roanoke, VA 24007-1578
(540) 343-0888

Attorney for the Petitioner
**Counsel of Record*

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QUESTIONS PRESENTED FOR REVIEW

1. Should a "willful blindness" instruction be given where the evidence does not support a conscious and deliberate avoidance of the truth by the defendant?

2. Did the trial court err in allowing a warrantless search of a locked trailer?

PARTIES TO THE PROCEEDING

The names of all parties to the proceeding appear in the caption of the case as Dennis Ainsworth McCarthy, Petitioner v. United States of America, Respondent

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

A copy of the unpublished opinion of the United States Court of Appeals for the Fourth Circuit, whose judgment is sought to be reviewed, is attached hereto as Apdx-9.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 14, 1999. This Petition for Certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under Title 28, U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory Provisions involved in this case are:

Title 21, United States Code, Section 841(a)(1), Prohibited acts , (a) Unlawful acts - Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally - (1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Title 21, United States Code, Section 846, Attempt and conspiracy - Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or

conspiracy; and

Title 18, United States Code, Section 2, Principals, (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

Dennis McCarthy was charged with conspiracy to possess with intent to distribute and to distribute marijuana with O'Neil Anthony Henry and unknown others and with possession with intent to distribute marijuana and was tried and convicted in the United States District Court for the Western District of Virginia. (Apdx-1). McCarthy and Henry, both black men, were occupants of a tractor-trailer when stopped on Interstate 81 in Wythe County, Virginia on March 13, 1998. State Trooper Haywood F. Wray (Wray) stopped the tractor trailer for equipment violations and found that Henry was operating the vehicle and that McCarthy was in the sleeping area of the tractor. Further investigation revealed that both mens' operator's licenses had been suspended in Virginia for failure to pay fines and that McCarthy did not have a current Commercial Driver's License. Wray advised both men that the vehicle would have to be towed until a licensed driver could be secured and each voluntarily signed forms indicating receipt of notice of

suspension of their licenses in Virginia. Both men were acting appropriately, were not nervous, did not attempt to escape and were fully cooperative. The Defendants testified that Wray asked for permission to search, that neither gave it, then Wray demanded the keys; Wray testified that he received consent from both men, but could not recall exactly what either of them said which signified consent. The search of the tractor revealed no contraband but the trailer contained a large load of boxed mangos and fourteen black suitcases stacked at the end of the trailer closest to the doors. Wray unzipped one of the suitcases and found a bundle wrapped in plastic, which he cut open, discovering marijuana, which was later weighed at 1940 pounds. The trailer was a refrigerated device equipped with a temperature recording device and had been padlocked prior to the search.

McCarthy was advised of his Miranda rights at the scene of the stop and told police that after picking up a load of mangos to be delivered to New Jersey, he had been approached at a truck stop in Texas by a man whom he believed to be a trucking broker who asked if they would take an additional load North. McCarthy agreed and Henry drove the truck to an agricultural area about ten minutes from the truck stop where others loaded items into the rear of the trailer. McCarthy was to arrive in New Jersey on Friday night (two days later) and the broker would page him to give delivery instructions. A price for taking the load was not discussed.

Agents Parker and Caldwell of the D.E.A. Task Force testified that they had been present when McCarthy made a second statement to police, which was consistent with his first statement. Parker related that when McCarthy described the events, he never said he had knowledge that marijuana was being transported. McCarthy would say "load" in describing what he was carrying and other police would say "you mean the marijuana load?" and McCarthy would answer affirmatively. McCarthy testified at trial that by the time he was questioned by police, he had been told by them that marijuana had been found in the trailer, a fact confirmed by the officers, and his affirmative answers to the policemens' questions were not intended to be admissions of prior knowledge.

Henry testified as a Government witness[1] that he had known McCarthy since 1993 and had occasionally accompanied McCarthy on trucking runs as a co-driver. On this trip, while they were preparing to leave with the mangoes, McCarthy made arrangements with a man whom Henry had seen before and who appeared to be a broker, then they drove to a nearby area to pick up an additional load to fill the truck. McCarthy got out and unlocked the back of the trailer while Henry remained in the truck. He heard noises which could have been a fork lift and people moving around,

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[1]Henry was acquitted by a jury composed of black and white jurors in an earlier, separate trial; McCarthy was convicted by an all white jury.

but he did not see who was back there or what was taking place.

Henry stated that it was not unusual for brokers to approach drivers asking if they needed a load or if they had additional space to take some extra things, that it was common practice to accept an additional partial load as a way of making extra money which would not have to be split with a broker, that truck drivers often do not load their own trucks, that it was common for truckers not to look in boxes that were loaded on their trailers and that Henry often did not know what he was carrying.

Henry further testified that they did not alter their planned route after picking up the additional load, even though they anticipated, and did, pass through a Customs checkpoint and numerous weigh stations in Texas, Arkansas and Tennessee where truck searches by the police were common. McCarthy did not act unusual or nervous during any portion of the trip and Henry had no reason to believe that the additional load contained marijuana or that McCarthy knew it was marijuana.

Harcourt Thelwell testified that he had been a truck driver for 14 years and that it was common practice for truck drivers to find loads through a broker, who in turn would be paid a commission. It was also common practice for truckers to find loads on their own, in which case the price for the load would not be split with the broker. He further testified that truckers generally avoided loading trucks so as not to be

responsible for damage to the merchandise and frequently did not know or attempt to find out the nature of the load they were hauling. He also stated that when hauling produce in a refrigerated trailer, truckers avoided opening the doors to prevent spoiling the produce with high temperatures.

McCarthy testified in his own defense and denied that he intentionally transported marijuana, pointing out the risk and stupidity of driving a trailer containing contraband, stacked at the back door and not hidden in any way, without a commercial driver's license, and with full knowledge that he would be passing through a Customs checkpoint widely known for searching trucks for illegal aliens and drugs.

REASONS FOR GRANTING THE PETITION

1. SHOULD A "WILLFUL BLINDNESS" INSTRUCTION BE GIVEN WHERE THE EVIDENCE DOES NOT SUPPORT A CONSCIOUS AND DELIBERATE AVOIDANCE OF THE TRUTH BY THE DEFENDANT?

The Court granted the following instruction over McCarthy's objection. (Apdx-6).

"The element of knowledge may by satisfied by inference drawn from proof that the Defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge.

Stated another way, the Defendant's knowledge of a fact

may be inferred from willful blindness to the existence of the fact. It is entirely up to you to decide whether you find any deliberate closing of the eyes and the inferences to be drawn from that evidence, if it exists. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge".

McCarthy concedes that this is a correct statement of law but that the instruction should not have been given because the facts of the case do not support it. McCarthy believes that granting this instruction in this factual context amounts to a decision about an important question of Federal law which should be decided by the United States Supreme Court, as it directly affected his right to a fair trial and to a decision by a properly instructed jury. Moreover, there is an apparent conflict between the Fourth Circuit and the Ninth Circuit as to when an instruction of this type may be given.

U.S. v. Schnabel, 939 F.2d 197 (4th Cir. 1991), a mail fraud case, involved evidence of a wide variety of fraudulent practices, openly conducted at the Defendant's place of business while he was the vice-president there, testimony that the Defendant was present at a meeting where fraudulent practices were discussed and evidence that the Defendant was assuring investors that their money was safe when in fact his company was commingling funds, selling the same mortgages to multiple investors and committing other illegal acts in an attempt to solve the company's financial difficulties. Under that fact situation, this Court approved the instruction and

characterized the case as one where there was evidence of both actual knowledge and deliberate ignorance.

U.S. v. Whittington, 26 F.3d 456 (4th Cir. 1994), involved Defendants who had persuaded Ms. Lust, an invalid, to transfer her estate to themselves and organizations they controlled. This Court approved the willful blindness obstruction because some of the Co-Defendants knew that Lust was incapacitated, and that another Co-Defendant who was her caretaker, and was without means herself, had come into possession of expensive items after working for Lust for only three weeks and when the Co-Defendants themselves were recipients of large checks from the invalid's accounts. The obstruction was approved with regard to another Co-Defendant who prepared legal documents for Lust which essentially transferred all of her property to the Defendants and who had notarized these documents when Lust's purported signature had already been placed on the document out of the notary's presence.

In U.S. v. Abbas, 74 F.3d 506 (4th Cir 1996), Abbas drove a Mr. Ali to Baltimore to sell heroin which Ali had just smuggled into the country. Both parties then sold the heroin to an undercover agent in a meeting which was recorded on audio and video tape. During that meeting Abbas discussed future drug transactions and other drug related matters and received $15,000.00 as a courier fee. Abbas defended on the grounds that he thought this was a gemstone transaction, but the Court approved the granting of the instruction.

In U.S. v. Guay, 108 F.3d 545 (4th Cir. 1997), a tractor trailer over turned on the highway and packages of cocaine wrapped in plastic were found in the wreckage. One of the Defendants made a statement to the police that he had been offered $20,000.00 to transport "Mexican smoke" to Canada, assuming it was marijuana, and allowed an individual to load the packages into the tractor where they were hidden under heavy watermelon boxes. This Defendant testified inconsistently at trial saying that he thought what he was hauling was untaxed cigarettes and that he was unaware of the true nature of the contents of the packages. The other Defendant initially denied any knowledge of the packages but later stated that he had seen the packages in the back of the trailer when he checked the load, inquired what they were and was told not to concern himself. His fingerprints were found on the packages themselves. This Defendant had also used false names on hotel records and in the truck's log book and was caught leaving the scene of the accident.

In U.S. v. Withers, 100 F. 3d 1142 (4th Cir. 1996), the Defendant was paid $15,000.00 in fees and $5,000.00 in expenses to travel to Japan and walk luggage containing heroin through customs, then leave the luggage at a hotel. Her defense was that she was never told this was a heroin smuggling scheme and that she believed she was carrying lingerie. The Court approved the willful blindness instruction, finding the circumstances of her trip and the fee paid too suspicious to support her claim of ignorance.

In each of these cases, the granting of the willful blindness obstruction was appropriate because there was overwhelming evidence of personal involvement by the Defendants, physical or testimonial evidence linking the Defendant to the crime and either demonstrating actual knowledge of what was happening or establishing a clear indication that illegal activities were afoot. For example, the meeting where fraudulent matters were discussed in Schnabel, the systematic and speedy looting of the invalid's estate in Whittington, the videotaped drug transaction and $15,000.00 fee in Abbas, the conflicting statements about Mexican smoke and the $20,000.00 fee in Guay, the $15,000.00 fee to carry a suitcase in Withers all demonstrate circumstances of such obvious and unambiguous wrong doing that no reasonable person could ignore them. In many of these cases, the Defendants had made inculpatory or conflicting statements about their knowledge or intentions which cast doubt on their credibility and suggested actual avoidance of knowledge so as to be able to fabricate to a defense. McCarthy's case totally lacks those kinds of links.

The Ninth Circuit has also dealt with the issue of this type of instruction in U.S. v. Jewell, 532 F.2d 697 (9th Cir.)(en banc), cert.denied, 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d (1976). That Court concluded that a *Jewell* instruction is appropriate only when the Defendant claims lack of guilty knowledge and the proof at trial supports an inference of deliberate ignorance, but cautions that this type

of instruction should be given rarely because of the risk that the jury will convict on a standard of negligence: that the Defendant *should* have known the conduct was illegal. U.S. v. Alvarado, 838 F.2d 311 (9th Cir 1988). Another Ninth Circuit case, U.S. v. McAllister, 747 F.2d 1273 (9th Cir. 1984), states that the Government may not carry its burden of showing intent by deliberate ignorance by demonstrating that the Defendant was mistaken, recklessly disregarded the truth, or was negligent in failing to inquire; instead, facts must support the inference that Defendant was aware of the high probability of the existence of the fact in question. An instruction given without an adequate factual basis may improperly lead the jury to infer guilty knowledge without proof of conscious avoidance of the truth. U.S. v. Murrieta-Bejarano, 552 F.2d 1323 (9th Cir. 1977).

The Ninth Circuit therefore requires to a high standard of proof, "to a high probability of the existence of the fact in question" before an instruction of this type is proper, whereas the Fourth Circuit seems to allow to a less stringent standard.

In this case, Government and Defense witnesses testified that it was common practice for truckers to pick up extra loads to fill in any existing space to earn extra money "on the side", that the extra load came from a man who was located in an area frequented by trucking brokers, who was acting like a broker, the load was picked up from an area near the truck stop which was consistent with and appeared to be a farming and produce area. Government and Defense

witnesses testified that it was uncommon for truck drivers to load their own trucks and common for the shipper to do the loading, that it was common for truckers not to know the exact contents of their load. Uncontradicted evidence from the Defense and the Government proved that the truck passed through the Customs stop in Texas after the marijuana had been loaded, with full knowledge by McCarthy that Customs agents had authority to and frequently did stop and search trailers looking for drugs or illegal aliens and that the truck passed through numerous weigh stations in Texas and Arkansas, where the same risks were attendant.

The location of the drugs and McCarthy's behavior also fails to support the claim of willful blindness. The suitcases containing marijuana were loaded on the very back end of the trailer, immediately next to the door, and were in plain view of anyone who opened the door. In addition, McCarthy had no commercial operator's license, the truck and trailer had several equipment violations and McCarthy's log books were not up to date, all of which were the type of things which Sergeant Wray thought would "raise my suspicion" and make him more likely to want to search the trailer.

Wray also testified that McCarthy did not appear to be nervous and upset after he had been stopped, was cooperative at all times and that he consented to a voluntarily search of the trailer. Wray was surprised by what he found in the trailer in light of McCarthy's demeanor.

In addition, McCarthy was advised of his rights on at

least two separate occasions, understood his rights and voluntarily waived his rights, giving multiple statements to several policemen. These statements did not conflict and at no time did he tell a story different than his testimony at trial, which was to deny knowledge of the marijuana. There was no indication that McCarthy had ever carried drugs before or that the police had any reason to believe that McCarthy was carrying drugs on this particular occasion prior to the stop.. McCarthy's statement contained no discussion of large fees for carrying the extra load and his trial testimony indicated he expected to receive $200.00 to $500.00 based on his prior experience.

Every aspect of the case which the Government claimed was suspicious, was explained in trial testimony by at least one Government and one Defense witness. Virtually none of the evidence was contradicted and there were no circumstances so suspicious that a reasonable person would have been on notice that something illegal was happening and simply closed his eyes to those circumstances.

If this Court determines that willful blindness obstruction was erroneously given in this case, the conviction may be affirmed only if the Court is satisfied beyond a reasonable doubt that the error was harmless, U.S. v. Hastings, 134 F.3d 235 (4th Cir 1998), and that a correctly instructed jury would have reached the same conclusion. Such a finding cannot be made in McCarthy's case and he should be awarded a new trial.

2. DID THE TRIAL COURT ERR IN ALLOWING TO A WARRANTLESS SEARCH OF A LOCKED TRAILER?

The Defendant filed a Motion to Suppress items seized as a result of the search of the tractor trailer on the grounds that the stop was unlawful and that the subsequent search was conducted without consent or legal justification, which motion was denied by the trial Court. (Apdx-3). Sgt. Wray of the Virginia State Police testified at the suppression hearing that he was on routine patrol on Interstate 81 when he stopped the vehicle for equipment violations. The Defendants subsequently conceded that the stop was lawful under these circumstances. Wray also testified that he determined that both men lacked valid driver's licenses in the state of Virginia and that he was in the process of making arrangements for the tractor trailer to be towed when he received consent to search from both Defendants. Wray admitted that the stop was entirely related to equipment violations and that he had no information about these Defendants or this particular tractor trailer prior to the stop. McCarthy testified that Wray asked for consent to search the vehicle and that neither Defendant gave an answer, whereupon Wray demanded the keys. Henry testified that likewise, he never gave consent to search but that Wray insisted that the keys be turned over.

McCarthy maintains that while the stop may have been legal, the subsequent search was not. There was clearly no probable cause to search, as there was no tip about this particular trailer, no information about the occupants of the

trailer or any other reason for the police to suspect that the trailer contained evidence or contraband. The Defendants were detained about forty minutes and the officer continued to hold their operator's licenses and other paperwork when the conversation about permission to search began. McCarthy denies that consent to search was given by either Defendant and maintains that the Government failed to meet its' burden of showing that consent was obtained or if it was, that consent was voluntary. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed2d 854 (1973). Burden of proving that consent to search was voluntary is on the government. Consent must be proved by clear and positive testimony and to be voluntary it must be unequivocal specific and intelligently given uncontaminated by duress or coercion. See also U.S. v. Erwin, 155 F.3d 818 (6th Cir. 1998), U.S. v. Scott, 578 F.2d 1186 (1978) and U.S. v. McCaleb, 552 F.2d 717, 721. Officer Wray made conflicting testimonies as to how consent was given and ultimately testified that he could not remember word for word how consent was given, citing U.S. v. Erwin, (a questionable consent hazily recollected fails to meet constitutional requirements). McCarthy further argues that even if the Court could reasonably find that he gave consent, that pursuant to U.S. v. Lattimore, 87 F.3d 647 (4th Cir. 1996), Wray exceeded the scope of the consent.

Prior to the search, Wray asked the Defendants the following questions, in order: (1) whether there were firearms in the vehicle ; (2) whether there were alcoholic beverages in

the truck; and (3) whether there were narcotics in the vehicle. This conversation took place while all parties were standing at or near the tractor portion of the tractor trailer, which Henry had been driving and in which McCarthy had been sleeping. The trailer itself was a padlocked refrigerator unit.

The Trial Court stated in its written opinion, "the scope of consent under the Fourth Amendment is measured by the standard of "objective reasonableness"....what would the typical reasonable person have understood by the exchange between the officer and the suspect", citing Florida v. Jimeno, 500 U.S. 248, 251 (1991). In McCarthy's case nothing in the conversation between Officer and suspect suggested knowing consent to search a locked trailer; the context surely suggested a search of the contents of the cab, including the sleeper where Henry and McCarthy had been located immediately prior to the stop and near where they were standing when the conversation took place. Wray also conceded that he never asked for permission to search any particular container, parcels, or packages, nor did he ask to search the trailer itself, nor did he attempt to define the area of the search in any way.

Even if this Court concludes that the consent to search was given and that it extended to the locked trailer, the issue of opening a suitcase, then cutting into a package inside that suitcase remains. The District Court concluded that because the Officer had asked about alcohol, firearms and drugs and found that the Defendants had consented to a search, that a search of a closed container was appropriate because these

questions had established the scope of the search, citing U.S. v. Stewart, 93 F.3d 189, 192 (5th Cir. 1996); U.S. v. Baker, 78 F.3d 1241, 1244-1245 (7th Cir. 1996); U.S. v. Rich, 992 F.2d 502, 506-08 (5th Cir. 1993).

However, Jimeno, 500 U.S. 551-552, acknowledges limits on authority to search even in the presence of broad consent, noting "it is very likely unreasonable to think that a suspect, by consenting to a search of his truck, has agreed to the breaking open of a locked briefcase within the truck." Functionally, there is little difference between a locked briefcase in a trunk and a zippered suitcase in a padlocked trailer.

The District Court found as a matter of law that Wray's unzipping the suitcase and cutting into the plastic wrapped packages, which completely hid the marijuana from view, was permissible because of "its ephemeral and trivial nature". McCarthy disputes this characterization as factually untrue and unsupported in law as a rationale for the search.

If the search did exceed the scope of consent, then it became a warrantless search. In warrantless search situations, the police may search a container within an automobile without a warrant where they have probable cause to believe that it contains contraband or evidence, California v. Acevedo, 500 U.S. 565 (1991). In this case, there was certainly no probable cause to search the suitcases, as Sergeant Wray freely admitted that he could not see what was inside the suitcases until he had unzipped them and did not

recognize the contents of the packages as marijuana until after he had cut into the wrapping. Under these circumstances, even if consent to search was given, it did not extend to the unzipping of a closed suitcase, and the cutting open of a wrapped package found inside a padlocked trailer and the marijuana seized in the search should have been suppressed.

CONCLUSION

For the foregoing reasons the Petitioner, Dennis Ainsworth McCarthy, respectfully requests a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit. (Apdx-9).

Respectfully Submitted,

David J. Damico, Esquire
Virginia State Bar I.D. 16229
P.O. Box 1578
313 Campbell Avenue, S.W.
Roanoke, VA 24007-1578
O - 540-343-0888
F - 540-345-0275

Counsel for the Petitioner,
Dennis Ainsworth McCarthy

APPENDIX

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by: /s/ TBS
Deputy Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION
MARCH, 1998, SESSION

UNITED STATES OF AMERICA v. ONEIL ANTHONY HENRY DENNIS AINSWORTH McCARTHY	Criminal No. 98-26

INDICTMENT
COUNT ONE

The Grand Jury charges:

1. That beginning on a date not known to the Grand Jury, but not later than on or about January 1,1998, and continuing until on or about March 13, 1998, in the Western

Judicial District of Virginia, ONEIL ANTHONY HENRY and DENNIS AINSWORTH McCARTHY, the defendants willfully and knowingly combined, conspired, confederated and agreed together, with each other, and with others whose identities are unknown to the Grand Jury to commit the following offenses against the United States, to wit: to possess with intent to distribute and to distribute marijuana, a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841.

2. All in violation of Title 21, United States Code, Section 846.

COUNT TWO

The Grand Jury charges:

1. That on or about March 13, 1998, in the Western Judicial District of Virginia, ONEIL ANTHONY HENRY and DENNIS AINSWORTH McCARTHY, the defendants, did willfully, knowingly, and intentionally possess with intent to distribute marijuana, a Schedule I controlled substance, or did aid and abet one another in doing so.

2. All in violation of Title 21, United States Code, Section 841 and Title 18, United States Code, Section 2.

A TRUE BILL, this /s/ 17th day of March, 1998.

/s/ Susan S. Hutchinson
FOREMAN

/s/
UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
	)	
v.	)	Criminal No. 98-26R
	)	
DENNIS A. McCARTHY, et al,	)	
Defendant	)	

MOTION TO SUPPRESS

COMES NOW, the Defendant, Dennis A. McCarthy, by Counsel and moves this Honorable Court to Suppress items seized as a result of a search of a particular tractor trailer conducted by members of the Virginia State Police and the Drug Enforcement Agency on or about March 13, 1998, in the Western District of Virginia on the following grounds:

1. That the stop of said tractor-trailer was without lawful grounds or legal justification;

2. That the conduct of law enforcement officers following the stop of said tractor trailer resulted in an unlawful seizure of said tractor-trailer, in violation of the Defendant's rights against unreasonable search and seizure;

3. That the subsequent search of said tractor-trailer

was conducted without consent of the Defendant or without other legal justification.

ACCORDINGLY, it is hereby requested that the items seized by the Government's agents from said tractor-trailer, specifically, marijuana, be suppressed as evidence against the Defendant and that any statements made by the Defendant, also be suppressed as fruit of the poisonous tree.

Respectfully Submitted,
DENNIS A. McCARTHY
/s/ David J. Damico
Of Counsel

David J. Damico, Esquire
Virginia Bar ID No. 16229
313 Campbell Avenue, S.W.
P.O. Box 1578
Roanoke, VA 24007-1578
O-540-343-0888
F-540-345-0275

Counsel for Dennis A. McCarthy, Defendant

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing Motion to Suppress was mailed to Anthony P. Giorno, Assistant United States Attorney, at the Office of the United States Attorney, P.O. Box 1709, Roanoke, Virginia, 24008, and to David E. Boone, Counsel

for Oneil Anthony Henry, at BOONE, BEALE, COSBY & LONG, 27 N. 17th Street, Richmond, Virginia, 23219-3607 on this the 4th day of May, 1998.

/s/ David J. Damico

JURY INSTRUCTION

The element of knowledge may be satisfied by inferences drawn from proof that the defendant deliberately closed his eyes, to what would otherwise have been obvious to him.

A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, the defendant's knowledge of a fact may be inferred from willful blindness to the existence of that fact.

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/s/ OCT 16 1998
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By: /s/ L. Craft
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff	)	
	)	
v.	)	Criminal No. 98-26R
	)	
DENNIS A. McCARTHY,	)	
Defendant	)	

NOTICE OF APPEAL

NOTICE is hereby given that Dennis A. McCarthy, the Defendant above named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the final judgment entered in this action on the 14th day of October, 1998.

Respectfully Submitted,
DENNIS A. McCARTHY
/s/ David J. Damico
Of Counsel

David J. Damico, Esquire
Virginia State Bar ID No. 16229
P.O. Box 1578
313 Campbell Avenue, S.W.
Roanoke, VA 24007-1578
O-540-343-0888
F-540-345-0275

Counsel for Defendant, Dennis A. McCarthy

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UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 98-4752

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

DENNIS AINSWORTH MCCARTHY,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Samuel G. Wilson, Chief District Judge. (CR-98-26-R)

Submitted: April 27, 1999 Decided: May 14, 1999

Before MURNAGHAN and WILLIAMS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

David Joseph Damico, Roanoke, Virginia, for Appellant.

Robert P. Crouch, Jr., United States Attorney, Anthony P. Giorno, Assistant United States Attorney, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Dennis Ainsworth McCarthy was convicted by a jury for conspiring to distribute marijuana in violation of 21 U.S.C. § 846 (1994) and possessing with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) (1994). He was sentenced to two concurrent sentences of 121 months' imprisonment. On appeal, he maintains that: (1) the district court erred in denying his motion to suppress the drugs seized because the officer exceeded the scope of the consent to search; (2) the district court erred in granting a willful blindness instruction; and (3) the district court improperly enhanced his sentence for obstruction of justice without making the necessary findings.

After reviewing the record and the applicable law, we find no reversible error. Accordingly, we affirm McCarthy's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED